

THE TAKEOVER PANEL

CONSOLIDATED GOLD FIELDS PLC

The Issue

On 26 April 1989, Minorco announced that it held or had obtained acceptances in respect of shares carrying 54.8% of the voting rights of Consolidated Gold Fields PLC ("Consgold") and accordingly had declared its offer unconditional as to acceptances. All regulatory consents required in respect of the offer have been given. However, Consgold, Gold Fields Mining Corporation ("GFMC"), a wholly owned subsidiary of Consgold, Newmont Mining Corporation ("Newmont"), which is 49% owned by Consgold, and Newmont Gold Company, a 90% owned subsidiary of Newmont, have obtained interim injunctions in the United States District Court for the Southern District of New York preventing Minorco from acquiring control of Consgold. Minorco's offer has, therefore, not become wholly unconditional.

The main issue of principle is whether, in continuing such proceedings without the approval of the shareholders in general meeting, the Consgold directors are in breach of General Principle 7 of the Code, and, if so, how such breach should be remedied. This involved the Panel in consideration of the interaction between the Code and legal proceedings, including legal proceedings in another jurisdiction, and the impact of the Code upon the duties of directors. We also had to decide whether Newmont's action was procured or controlled by Consgold. Finally the question arose of to when, if at all, the Panel should extend the deadline by which the conditions attaching to a bid must be fulfilled. This required the Panel to consider what weight should be given to the decision of the majority of shareholders that a bid for the company should be accepted. These issues arose in a highly unusual situation, and are both important and difficult.

Ruling

The Panel considers that the continuance of the US proceedings without shareholder approval clearly has the effect of frustrating the offer for Consgold and so is contrary to General Principle 7. Consgold should forthwith discontinue such proceedings unless the directors obtain shareholders' approval in general meeting by 30 May. The majority view of shareholders as to the future of their company should be respected.

The proceedings brought by Newmont have not, on the evidence before us, been procured or controlled by Consgold. So General Principle 7 does not extend to Newmont's proceedings, and we make no order against Consgold in respect of those proceedings.

We grant a limited extension of the bid timetable to enable the Consgold board to summon a shareholders' meeting. We detail below a timetable which means that at the latest the bid will either lapse or go unconditional by 7 June, the date by which payment was due under the original timetable of the bid.

We regard it as fundamental that Consgold should comply with the Code, and this order gives a limited time in which Newmont, and possibly the US court, may reconsider whether an action should continue which has the effect of preventing the majority of shareholders in Consgold from determining the future of their company. It follows, however, that if Newmont's proceedings are not terminated within the extended timetable, the bid will lapse. This results from the highly unusual circumstances of this case. We are justified in preventing Consgold from continuing its proceedings in the US without shareholders' approval. There are, however, no grounds for preventing Newmont, which perceives its interests as affected by the proposed takeover, from legitimately seeking to protect those interests in so far as it can in the US courts.

The Facts

Prior to its first offer made on 21 September 1988, Minorco owned 28.9% of the issued share capital of Consgold. On 4 October 1988, Minorco posted its first offer document. On 11 October, Consgold, GFMC and the Newmont companies commenced anti-trust proceedings in New York, claiming that the proposed acquisition violated Section 7 of the Clayton Act and also contending that there had been a violation of securities fraud laws.

On 19 October 1988, the Secretary of State for Trade and Industry appointed Inspectors under Section 442 of the Companies Act 1985 to investigate and report on the membership of Consgold with particular reference to undisclosed concert parties, and also under Section 177 of the Financial Services Act 1986 to investigate possible insider dealing. At that time, Consgold sought a ruling of the Panel that Minorco's offer should lapse pending the outcome of the enquiry by the Inspectors, but the Panel declined to make such an order. The Panel considered that, in the absence of any evidence which pointed to a breach of the Code by Minorco, there could be no justification for it requiring the bid to lapse. That remains the position. Neither the Department of Trade and Industry nor any other party has placed any material before us which would justify the Panel preventing Minorco from pursuing its bid.

In the event, however, the first bid lapsed because, on 25 October 1988, the Secretary of State, on the advice of the Office of Fair Trading, referred it to the Monopolies and Mergers Commission. On the same day the United States District Court issued a preliminary injunction to Newmont preventing Minorco from acquiring control of Consgold. The Court also ruled that Consgold had no standing to pursue its anti-trust claim. Both Minorco and Consgold appealed this decision. All parties clearly appreciated that Minorco might well launch a further offer if it was cleared to do so.

On 2 February 1989, the Secretary of State, on the advice of the Monopolies and Mergers Commission that the proposed merger would not operate against the public interest, cleared Minorco to make a fresh bid. The European Commission also ruled that there was no objection to a bid by Minorco for Consgold. In accordance with the Note on Rule 35 of the Code, Minorco was therefore permitted to make a fresh offer within 21 days of the clearance and, on 20 February 1989, Minorco announced its new offer. Its offer document, posted on 25 February, included a condition relating to the non-existence of any legal action which would prohibit implementation of the offer or render Minorco unable to acquire some or all of the shares in Consgold, and specifically referred to the legal proceedings brought by Consgold and Newmont in the United States. This condition was intended to protect Minorco, particularly against any suggestion that its final offer was a breach of the US injunction and so a contempt of court.

On 22 March 1989, the US Federal Court of Appeals dismissed Minorco's appeal against the interim injunction granted in favour of Newmont. The Court also allowed the appeal by Consgold concerning its standing to bring an anti-trust claim, and so ruled that it was also entitled to an interim injunction in similar terms to that granted in favour of Newmont. There have subsequently been further applications to the Court, to consider proposals by Minorco which it submitted would avoid the risk of any activity in breach of the anti-trust laws, but the Court has ruled that the injunction should continue in full force. An interim injunction would normally continue in force until such time as a full trial of the anti-trust proceedings was held.

On 31 March, Minorco, through its advisers, asked the Executive to consider whether the time provided by Rule 31.7 for the fulfilment of all conditions of the offer (21 days after the date on which the offer is declared unconditional as to acceptances) could be extended in the event that the United States legal proceedings were not concluded within a normal bid timetable. Minorco also raised the question whether the commencement and continuance of the legal proceedings in the United States constituted a breach of General Principle 7 on the part of the

directors of Consgold. The Executive, however, declined to decide either of these issues at that time, on the ground that they would be irrelevant if Minorco failed to obtain sufficient acceptances to declare its offer unconditional as to acceptances or if it succeeded in obtaining the discharge of the injunction in the United States Court. The Executive considered, as the Panel itself had done in an earlier case concerning the offer by Lloyds Bank for Standard Chartered, that it would be inappropriate to give a ruling on an issue which might for one of a number of reasons become academic. The Executive was also reluctant to consider giving a ruling which might interfere with existing legal proceedings unless a practical necessity to do so arose.

By 26 April the need to consider the issue had plainly arisen, since at that time the offer was declared unconditional as to acceptances but the United States injunction remained in force. Minorco's advisers formally complained to the Panel that Consgold's directors were in breach of General Principle 7. They also submitted that, if Consgold were to be permitted to remedy the breach by seeking shareholder approval, an extension ought to be granted of the time within which the offer must become wholly unconditional.

The relevant provisions of the Code

General Principle 7 of the Code provides as follows:-

"At no time after a bona fide offer has been communicated to the board of the offeree company, or after the board of the offeree company has reason to believe that a bona fide offer might be imminent, may any action be taken by the board of the offeree company in relation to the affairs of the company, without the approval of the shareholders in general meeting, which could effectively result in any bona fide offer being frustrated or in the shareholders being denied an opportunity to decide on its merits."

Rule 21 sets out certain specific frustrating action which must not be taken without the approval of shareholders. Legal proceedings are not included. The Rules are not, however, exhaustive of the situations in which the General Principles can apply. So the first essential issue which we had to decide was whether commencement or continuation of the legal action in the United States by Consgold and Newmont, without the approval of the shareholders of Consgold, constitutes a breach of General Principle 7 and, if so, what the remedy should be. In considering this issue, the position of Consgold and its wholly owned subsidiary, GFMC, must be regarded as identical. The position of Newmont and its subsidiary falls for separate consideration since Consgold only owns 49.3% of Newmont, and it is necessary to examine the relationship between the two companies carefully. It is only the actions of the directors of the target company which are subject to General Principle 7. Minorco accepted that the only order it could seek in regard to Newmont's proceedings was an order that Consgold should use its influence with Newmont to persuade it to discontinue its proceedings .

The approach of the Panel to legal proceedings

The Panel has in the past been reluctant to interfere with the taking of legal action by parties to an offer. The Panel would not lightly seek to preclude a party from pursuing proceedings which can legitimately be brought before a court whether in the UK or overseas jurisdictions. Any attempt to invoke the jurisdiction of the Courts during a takeover has in the past been resolved without it becoming necessary for the Panel to consider whether the nature of such proceedings, or the time at which they were brought, had conflicted with General Principle 7. In 1977, in Dunford and Elliott v Johnson and Firth-Brown [1977]1 L1.L.R.505, at page 510 Lord Denning MR said:-

"The very moving for an injunction would seem to be a breach of General Principle 4 [how General Principle 7] of the Code; seeing that it is an action which is designed to frustrate the making of a bid."

In the event, the injunction was refused so no final ruling had to be made by the Panel as to whether the legal proceedings gave rise to a breach. On 18 January 1977, however, the Panel issued a statement in the following terms:-

"If the board of an offeree company contemplates legal proceedings in relation to an offer or prospective offer, problems may in certain circumstances arise under the Code. The board would therefore be well advised in such a case to consult the Panel before any action is taken."

This history indicates that it has in the past been contemplated that legal proceedings might, depending upon their nature and timing, give rise to a potential conflict with the provisions of the Code. The statement of 18 January 1977 has never, however, been incorporated as a Note in the Code. In practice litigation, whether tactical or otherwise, which might frustrate an offer has never previously reached the point at which the Panel has been required to consider making an order requiring the discontinuance of legal proceedings unless the approval of shareholders is obtained to its continuance. This reflects the practice of the Executive, which we believe to have served the Panel well, of not ruling on such an issue until it became at least probable that the proceedings would in the event actually frustrate the offer.

The reluctance of the Panel to take action which would in any way interfere with the exercise of jurisdiction by the Courts applies equally to proceedings in foreign courts, such as those in the United States District Court in this case, as to proceedings in this country. The action taken in the United States District Court is brought by the plaintiffs under Section 16 of the Clayton Act claiming anti-competitive conduct which infringes Section 7. In proceedings brought under this Section, the determination of whether a proposed acquisition violates Section 7 of the Act ultimately lies exclusively with the Courts. No arm of the United States government is entitled to block an acquisition in advance on the ground of contravention of Section 7. A claim for an injunction preventing a proposed

acquisition may be brought either by public authorities, such as the Department of Justice or the Federal Trade Commission, or by a private litigant. Whilst the proceedings are designed to protect the public against anti-trust activities, Section 16 of the Clayton Act entitles private litigants to commence such actions, in which they can recover for their own benefit the full remedies available under the law. It is regarded as helpful to the enforcement of the policy of the law that private litigants who may be damaged by anti-competitive actions can bring such proceedings, to reinforce the attempts of government to secure enforcement. We were informed that it is common practice for directors of US companies to consider whether to take such proceedings, and that "it is the duty of directors to file an anti-trust suit when in their business judgment the proposed combination would be illegal or otherwise detrimental to the corporation . . .". It appears that anti-trust suits brought by private litigants are much more frequent than those initiated by government agencies.

In ruling on the claims by Cons gold and Newmont in the United States proceedings, the US Court has not made conclusive findings that any acquisition of Consgold by Minorco would violate United States anti-trust laws. The Court has essentially held that Consgold and Newmont have a serious case which can properly go to full trial, and is "holding the ring" by the grant of an interim injunction on principles which in broad terms are not dissimilar to those on which the Court grants an interlocutory injunction in this country. All parties accepted that we should, therefore, proceed on the basis that the substance of the claim being brought in the United States Court is one which could succeed upon full investigation at trial. We note, however, as did Judge Mukasey in ordering a preliminary injunction, that the proposed takeover has not been challenged either by the United States Justice department, or the Committee on Foreign Investment in the United States. On 21 October 1988, the Department of Justice and the Federal Trade Commission had allowed the waiting period under the Hart Scott Rodino Anti-Trust Improvement Act to expire, effectively discontinuing any investigation by the United States administration in the United States. The Committee on

Foreign Investment in the United States, whose members include five cabinet ministers, reviewed the transaction over a period of five months and have not sought to take any steps to block it. This is not, therefore, a case in which any public body in the United States has initiated proceedings to prevent Minorco pursuing its bid. Whilst, as we have already stated, the nature of the proceedings is designed to secure the public benefit, those which have at present been instituted are brought purely by Consgold and Newmont as private litigants.

We hope we have already made plain that in considering the issues before us we do not intend to show any disrespect to the United States Court. We consider that the issue of principle which has to be decided is exactly the same as if proceedings had been instituted in the Courts of this country. We are conscious of the implications for control over bids if parties seek the intervention of a court. Although we are not suggesting that this is so in the present case, litigation could become a tactical weapon intended to prevent a bid from being considered on its merits. All this could take place regardless of the views of the shareholders who own the company. We think that, in principle, this would be highly undesirable and potentially gravely damaging to the orderly conduct of bids. In saying this, we are not suggesting that it may not be appropriate to take legal proceedings which frustrate a bid. All we are saying is that the shareholders should be entitled to decide whether such actions should take place.

The submissions of the parties

The essential submission of Minorco was that the legal proceedings brought in the United States were now frustrating the offer and preventing the shareholders from deciding the bid on its merits. Whether or not this was true at the commencement of the proceedings, the present position is that shareholders holding, together with Minorco, a majority of Consgold's shares have accepted the Minorco offer but will be prevented from selling their shares to Minorco unless the United States proceedings are discontinued. Without such discontinuance, the

bid cannot go unconditional if Minorco is to avoid breaching the US court's order. Minorco submits that the duties of directors to act in the best interests of the company as they perceive it are affected or limited by the provisions of the Code, and that in the present case the directors are not entitled to continue proceedings which frustrate an offer without seeking the approval of all shareholders.

Consgold accepted that the actions detailed in Rule 21 were not exhaustive of the application of General Principle 7. It also accepted that litigation, whether in this country or in other jurisdictions, could constitute frustrating action. It further accepted that the issue of whether frustrating action in fact existed had to be assessed objectively by regard to all the circumstances. Consgold's principal submission was that Minorco had made its second offer in the knowledge of the existence of the US proceedings. It had made the cessation of those proceedings a condition without fulfilment of which its offer would not be declared conditional. The bid had been conducted throughout in the full knowledge that the US proceedings could prevent the offer being implemented. Minorco had taken steps in the US to seek to obtain the discharge of the injunction and, until those steps failed, had not seriously raised with the Panel Executive the possibility that the litigation might constitute frustrating action. The Panel Executive had not raised the issue with Consgold until after day 60. The market trading in the shares of Consgold had been influenced by the knowledge of the action in the US, and to some extent by the state of play in that action at various times. The existence of the proceedings may well have depressed the price of Consgold's shares, and the market position could, therefore, have been distinctly different if the Panel had ruled at an earlier date that there was frustrating action. Consgold submitted that it was too late for such a ruling to be made now, having regard to the need to secure both the integrity of the market and fairness to Consgold shareholders.

Consgold further submitted that the proceedings in the United States Court have substance and are legitimately brought to protect the interests of the companies concerned. It argued that the proceedings are being pursued in fulfilment of the responsibilities of its directors to protect the interests of the company. It submitted that this remained the position, notwithstanding that the majority of shareholders had by 26 April clearly indicated a wish that control of the company should pass to Minorco. Consgold reinforced this submission by reference to the legal responsibilities of directors. It referred to an opinion given by Leading Counsel, Mr Richard Sykes QC, as to the duties of directors. A letter of advice from Consgold's solicitors (Freshfields) summarising this opinion concludes in the following terms:-

"In view of the assessment of the interests of Gold Fields [made by Consgold's directors], and of the continuing existence of minority shareholders, the Directors have been advised that they are entitled and bound to continue with the US litigation and that failure to do so could expose them to risk of suit from minority shareholders for breach of duty. Just because the Minorco bid has now attracted acceptances sufficient to enable it to go unconditional as to acceptances, the Directors cannot simply abandon a course which has been taken by them on the basis that it is in the interests of Gold Fields."

It was accordingly submitted by Consgold that the directors are doing no more than fulfilling their duty. It further submitted that acceptance of the complaint by Minorco would necessarily lead to an extension of the bid timetable but without a guarantee that a conclusive result would then emerge. It is said not to be in the interests of either Consgold, the conduct of bids, or an orderly market.

The Panel's reasons

We have stated that legal proceedings can in principle clearly constitute frustrating action. Such action is not to be evaluated just by reference to the subjective intention of the directors, although this may be relevant, since the essential test is whether the action taken by the board "could effectively result in . . . any . . . offer being frustrated . . .". This is ultimately an objective test. Clearly, depending upon their nature and timing, legal proceedings can have this result. In the present case, the form of injunction is unequivocally framed so as to prevent Minorco from implementing its offer and so would have the effect of precluding its success irrespective of the wishes of shareholders. The stage has undoubtedly been reached now, whatever the position earlier, where the litigation is plainly frustrating the offer. It is solely the litigation which stands between Minorco and the success of its bid. This would remain the position until such time in the future as proceedings are finally held and determined in the US Courts. This could be a year or considerably more if the appeal processes were invoked. We consider that this plainly has the effect of frustrating the offer.

Nor do we consider the position is different because of the nature of the duty of directors. Whilst we accept the statement of the law by Mr Richard Sykes, we consider that the action which may be taken by directors in fulfilment of their duties can be limited by the Code. The introduction to the General Principles of the Code provides as follows:-

"While the boards of an offeror and the offeree company and their respective advisers have a duty to act in the best interests of their respective shareholders, these General Principles and the ensuing Rules will, inevitably, impinge on the freedom of action of boards and persons involved in offers; they must, therefore, accept that there are limitations in connection with offers on the manner in which the pursuit of those interests can be carried out."

This makes it clear that directors must respect the Code in fulfilling their functions. In considering their view of the best interests of the company, directors must have regard to the requirements of the Code and the Panel.

General Principle 7 is one of the most important in the Code. It prevents action being taken by directors which may bring the interests of management into conflict with those of shareholders. It is an important element in securing that shareholders be given the opportunity to consider a bid for their company. It is because of respect for the interests of shareholders that frustrating action is permitted if, but only if, it is approved by shareholders. We consider that, if the board of Consgold think it appropriate to continue their action, they should comply with the Code by seeking to obtain the consent of shareholders at the earliest possible opportunity. If this consent is obtained, then it will be wholly appropriate for Consgold to continue the proceedings. If it is not obtained, then Consgold should discontinue the proceedings which as a private litigant it is free to do at any time. This way of proceeding, therefore, ensures that the wishes of shareholders are taken into account, but in no way involves an interference with the jurisdiction of the United States Courts.

In reaching this conclusion we considered carefully the argument that the position should have been considered at an earlier stage. It is perfectly true that, at the commencement of proceedings in the US, Minorco could have formally asked the Panel to rule whether, if those proceedings developed in a particular way, they would frustrate a bid. It is also true that the Executive could then, or at any subsequent stage, have raised the point on its own initiative. Consgold itself could for that matter have consulted on the point, although we are in no way criticising it for failing to do so. However, the issue would have remained wholly academic if, in this close fought contest, Minorco had not obtained sufficient acceptances or had succeeded in its attempt to have the US injunction discharged. We accept that the offer was considered by shareholders without the knowledge that the Panel might subsequently be asked to reach

the conclusion that the proceedings were frustrating the offer. But we have to weigh this point in the balance against the fact that, at the present time, the continuance of the proceedings is undoubtedly frustrating the wish of shareholders holding the majority of Consgold's shares that control of the company should pass to Minorco. It is very important to uphold the principle of majority control. It is also important to make it plain that in the ordinary course of events there should be recourse to litigation to prevent the offer only if the shareholders consent. The shareholders must be entitled to express a view on action designed to prevent them from receiving the benefit of an offer for their company.

Nor does the fact that the second bid was launched in knowledge of the proceedings in the United States Court in any way assist Consgold. The bid process by Minorco for Consgold has, in reality, been continuous since the end of September 1988, and Consgold could clearly have anticipated in bringing and continuing its proceedings that Minorco might well, if cleared by the Secretary of State, make a fresh offer.

We are, by contrast, concerned that Consgold has nowhere indicated a concern of its directors to ensure that the wishes of the holders of a majority of its shares are taken into account or that an offer for the shares in the company should, if at all possible, be decided on its merits by a majority of shareholders. We consider that, if at all possible, the Panel should ensure that the decision of the majority of shareholders as to control of the company should be respected and given effect.

Newmont's position

We have so far dealt with the position of the directors of Consgold in relation to the proceedings brought by Consgold, and its wholly owned subsidiary, GFMC. The order we would make in regard to the action of GFMC will be directed wholly to the directors of the parent company. We must turn, however, to consider whether any order can properly be made against the directors of Consgold in regard to the proceedings brought by

Newmont and its subsidiary. This depends upon whether Consgold can be said to control Newmont either in the practical or legal sense. Minorco recognised that it could not complain directly that Newmont itself had taken frustrating action. It is only the directors of the target company who are subject to the obligations of General Principle 7. Newmont appeared before the Panel to assist us with submissions and evidence but not as a party to the proceedings.

We first detail the formal legal position with regard to control of Newmont. Consgold owns 49.3% of the common stock of Newmont. Newmont is a corporation existing and organised under the laws of the State of Delaware. The board of directors of Newmont had ten members, now reduced to nine, three of whom are designated by Consgold. The relationship between Consgold and Newmont is in part governed by a "standstill agreement" and, in so far as it relates to Consgold's position as a Newmont shareholder and the position of its appointees on the Newmont board, by Delaware law. The standstill agreement contains the following provisions:-

1. Except as otherwise permitted, the Consgold Group shall not, without the prior consent of the majority of the board of Newmont, including a majority of the independent directors, acquire more than 49.9% of the voting power of all outstanding voting securities of Newmont.
2. Consgold may nominate no more than 40% of the members of the Newmont board.
3. The Newmont board must nominate for election as directors (i) Consgold's nominees (subject to the 40% limitation) and (ii) at least an equal number of qualified persons independent both of Consgold and of the management of Newmont.
4. At each meeting of stockholders of Newmont, Consgold shall vote its shares for the nominees for director recommended by the Newmont board (which shall include

the requisite number of Consgold's nominees). Consgold may not solicit proxies with respect to the election of directors of Newmont in opposition to the nominees recommended by the Newmont board. Consgold may vote its shares on all other matters as it determines in its sole discretion.

Newmont attaches considerable importance to the standstill agreement since, whilst it does not render Newmont bid proof, it gives a protection against what might otherwise be the exercise of control by someone holding almost 50% of the shares. Consgold submitted a memorandum from Paul, Weiss, Rifkind, Wharton and Garrison, its US lawyers, which detailed the provisions we have set out, and also suggested that in Delaware law shareholders in Newmont could not require the board to discontinue the litigation. It also explained why Consgold was not able to remove the directors of the board of Newmont so as to secure a majority as a prelude to securing a majority on the board for discontinuance of the Court proceedings. Thus, according to this memorandum, Consgold does not have the ability to dictate Newmont's actions in regard to the litigation.

Newmont amplified this position in its evidence to the Panel. First, it submitted a letter dated 3 May 1989 which set out the position in some detail. Since it is important, we set out certain paragraphs of that letter.

"At all times since 1981 ConsGold's relationship with Newmont at the Board level has been in keeping with the terms of standstill agreements from time to time in effect. At present, ConsGold nominates three directors. As of our Annual Meeting on May 4, 1989, the whole Board will have nine members. Three executive directors and three independent directors will complete the whole Board. The standstill agreement, it should be noted, requires at all times at least an equal number of non-ConsGold directors as there are ConsGold nominees, for which purpose executive directors are not counted. ConsGold has a comparable minority presence on key committees: Executive (2 of 6),

Finance (2 of 5), Strategy (2 of 5), Nominating (1 of 3), and Compensation (1 of 4). The executive directors of Newmont have each had long careers with Newmont, and no relationships with ConsGold predating its taking up shares. In effect, therefore, six of the nine directors are distinctly and demonstrably non-ConsGold.

The Board of Directors is advised in major legal matters by the firm of White & Case, which counsel has advised it for more than 25 years. Their role encompasses active representation in the Minorco-related litigation. The directors other than those who represent ConsGold or are executives are additionally and separately advised by the firm of Debevoise & Plimpton in respect of Minorco-related matters. Decisions by Newmont with respect to initiation of the antitrust action were taken with the participating advice of the firm of Covington & Burling which has specially advised Newmont in antitrust matters for more than 25 years.

These firms have on every occasion rendered their advices to the Newmont Board outside the presence and hearing of representatives of ConsGold and without receiving instruction on the matter from any such representatives.

ConsGold is plainly not in a position through its Board position or by its shareholding to impose decisions upon Newmont's management or Board, including in connection with the Minorco litigation. ConsGold has not attempted to do so. Thus the decisions taken by the Board of Newmont to initiate and prosecute the Minorco litigation have been reached without any participation by the ConsGold representatives on the Board. Newmont's Board can and does therefore unequivocally confirm that none of its decisions have been procured or imposed by ConsGold or any of its nominees as directors. Furthermore it should be understood that this has special significance because Newmont's interests are not necessarily identical with those of ConsGold: in addition to being exposed to different types

of antitrust injury, Newmont's Board opposes in principle a Minorco-sponsored sale of control of Newmont which might result if Minorco were successful in the litigation. The standstill agreement with ConsGold, which was achieved as a result of vigorous negotiation at arms length in every iteration or amendment and which is central to preservation of values to Newmont's public shareholders, would be destroyed by such a sale. It is also important to note that the standstill agreement was intensively and extensively litigated as to its serving the interests of all stockholders, in an action entitled Ivanhoe Partners et al v. Newmont Mining Corporation et al, Civil Action 9221, with supporting opinions thereon issued by both the Delaware Chancery Court and the Delaware Supreme Court. Indeed, the operating provisions of the standstill agreement were therein held to respond appropriately to the twin threats to Newmont's public shareholders as posed at that time by Ivanhoe and, as a result of Ivanhoe's share purchases, potentially by ConsGold itself.

The Panel should consider it material also that Newmont's Board of Directors has retained the investment banking firm of James D. Wolfensohn Incorporated, to confirm in financial and other non-legal terms that the best interests of Newmont's shareholders have been served by initiating and vigorously pressing Newmont's legal rights against Minorco. Such confirmation is in place.

Despite intense activity to that end on Minorco's part, nothing has emerged in the referenced litigation which would remotely suggest that Newmont's shareholders' interests and values can be protected, much less enhanced, by substituting a different form of interim relief for the preliminary injunction now in effect. We make this observation lest it be suggested by Minorco to the Panel that a Panel directive to whomever or a Panel grant of additional time to Minorco would contribute in the slightest to the potential for Newmont's joining in altering the terms of the injunction.

Neither of those actions by the Panel would relieve Newmont's Board of its duty to oppose Minorco's obtaining control of the shares of Newmont held by ConsGold."

Mr Leather, the Vice Chairman of Newmont, elaborated on this position orally. He identified the independent directors of Newmont as men of stature and considerable commercial experience. He stressed that the independent directors played an important role in the taking of major decisions by Newmont, including the decision whether to take anti-trust proceedings. If they did not, they could be subject to legal action. He confirmed that there were four directors of ConsGold on the board of Newmont. One of these, Mr Parker, the Chairman, President and Chief Executive of Newmont, was a long standing executive of Newmont who had gone on the board of ConsGold in 1985 but who was essentially a Newmont man. He told us that the other three ConsGold directors played no part in the decision by Newmont as to whether or not to commence, and continue, the anti-trust proceedings. He explained that Newmont had good reasons of its own for wanting to prevent the takeover by Minorco. Newmont regarded itself as a low cost, expansionist, producer of gold. It had increased production by 400% from 1982 to 1987. It planned a further substantial increase in production. It had long been concerned that a move by Minorco in respect of ConsGold could potentially impinge on Newmont's plans, because of the risk that Minorco would not wish to expand, or possibly even maintain, Newmont's level of production. He was also concerned, although it was a subsidiary factor, about the possible effect on Newmont if control of 49% of its equity was effectively in South African hands. In all respects Newmont considered that the existing position, where an independent ConsGold holds its shareholding under the standstill agreement, was preferable. He did not consider that it was right that Newmont should be "put in play" at the present time, when its expansion plans are only partially complete. He said that he would have recommended the board to commence proceedings against Minorco irrespective of the position of ConsGold.

Mr Leather also told us that, when the board of Newmont learnt last week that the Panel was being asked to order that Consgold should be required to discontinue its legal proceedings, the board considered what it would do in the event that the Panel so ordered. The board received further financial and legal advice before it considered the position. The only one of the three Consgold representatives on the board present at the meeting in no way sought to influence the meeting, and withdrew from the meeting whilst the issue was considered. The board decided that, irrespective of whether Consgold continued its action, Newmont would not withdraw its own proceedings. It considered that action to be in the best interests of Newmont.

Minorco submitted that these statements conflicted with some of the arguments made in the anti-trust proceedings. It pointed to extracts from the material filed in those proceedings which suggested that the anti-competitive influences would arise precisely because a takeover of Consgold by Minorco would give rise to control of or substantial influence over Newmont. It suggested that this accorded with the reality where one shareholder held 49%. It was on this basis that the interim injunction was granted.

In the light of the evidence before us, we conclude that Consgold does not in a legal sense control Newmont. We accept that, in view of its shareholding, Consgold may have considerable influence in regard to the general direction of the affairs of Newmont particularly in so far as its corporate plans might require the raising of new capital. We do not, however, consider that Consgold has controlled, procured or been a dominant influence in the commencement or continuance of the legal proceedings by Newmont. Nor do we consider that Consgold could require or procure their discontinuance. The fact, relied upon by Minorco, that there was substantial cooperation between lawyers for Consgold and Newmont in the anti-trust proceedings does not surprise us. They each separately considered that their interests would be best served by seeking an injunction, and having established between principals that this was so, left it to the lawyers to liaise and make common course as

appropriate. The reality is that, for the reasons given by Mr Leather, Newmont understandably considered that its own separate interests would be served by taking anti-trust proceedings. Newmont and Consgold were, as he put it, "natural allies".

We are fortified in this conclusion by a submission made in evidence by Mr Epstein of Shearman & Sterling, Minorco's US lawyer. He expressed the view that the position was correctly described in the letter of 3 May from which we have extensively quoted. He submitted that what was incorrect was the different claim made before the US court, namely that Consgold could control or substantially influence the affairs of Newmont. All we are ruling, however, is that Consgold have not controlled or procured or been a dominant influence in, the decision of Newmont to take legal proceedings.

In the light of this conclusion, we do not consider we can properly make any order against Consgold in regard to the legal proceedings commenced by Newmont. Minorco considered that we should require those directors of Consgold who were also directors of Minorco to use their best endeavours to persuade or influence Newmont to withdraw its anti-trust proceedings. We consider that such an approach would be inappropriate. First, there is no evidence that the Consgold directors are responsible for Newmont's taking anti-trust proceedings and, consequently, Newmont's taking of such action gives rise to no breach of General Principle 7 by Consgold's directors. The position would be different if Newmont were acting as an agent or creature of Consgold in taking such proceedings, or possibly even if Newmont had been simply persuaded to do so by Consgold. In the absence of such a conclusion, we consider it would be inappropriate to require the directors of Consgold who are also directors of Newmont to carry out their latter functions otherwise than in accordance with their distinct duty to Newmont.

The Panel's order

In the light of our conclusions relating to Newmont, we had to consider whether it was proper to make any order against Consgold. It can be said that such an order may have no practical effect because, even if Consgold does discontinue its proceedings, the bid will still lapse unless Newmont also withdraws its claim or the situation otherwise changes in the US Court. We did not, however, consider we could proceed on the basis that such an outcome should be taken for granted. We consider that we should proceed in an orderly way by requiring Consgold to discontinue its litigation forthwith, unless it is approved by shareholders. We should set a timetable which enables that issue to be decided by 30 May. We should then allow a further 7 days from the date of the shareholders' meeting or, if Consgold decides not to convene a meeting, from the date Consgold withdraws its litigation before the bid must lapse. This is in case for any reason, in the light of the decision of Consgold, Newmont reconsiders its own previously held view as to the future of its proceedings or, in the admittedly limited time available, the US court reaches any different decision as to the future of the action. We take this course because we think that all proper steps should be exhausted before it is accepted that the majority decision that control of a company subject to the Code should pass to Minorco is rendered ineffective by any action in the US Court.

We recognise that this extends the last potential date by which the bid can become fully unconditional by 20 days beyond day 81, but this is not beyond the latest date on which payment would become due to accepting shareholders under the terms of the offer. We consider it would be less fair to those shareholders who have accepted the bid if we did not require Consgold to discontinue its frustrating action unless it gets shareholder approval.

As has already been indicated, the order of the Panel will mean the necessary extension of the bid timetable to enable shareholders to consider whether or not to approve the action of the board. We therefore order as follows:-

- (i) Consgold should withdraw its United States proceedings, and procure that those of GFMC are withdrawn, unless Consgold convenes a general meeting to approve the action of the board for a date on or before 30 May 1989, in which event Consgold should withdraw, and procure the withdrawal of, the proceedings forthwith if shareholders fail to approve them.
- (ii) The time for the offer becoming fully unconditional in compliance with Rule 31.7 shall be seven days after the time when the shareholders meeting to approve the US proceedings is held or, if earlier, after the time when those proceedings are withdrawn (but not, in any event, before 17 May).
- (iii) So far as the Code is concerned, Minorco may, notwithstanding Rule 18, use any authority it validly holds to vote on any resolution put to such a meeting to seek shareholder approval of the litigation. However, it is not for the Panel to determine whether as a matter of law Minorco has any such authority.
- (iv) Minorco may exercise the votes attaching to its own Consgold shares at any meeting called to approve the United States proceedings. Consgold should not take any legal proceedings, whether in this country or elsewhere, with a view to preventing Minorco from exercising its voting rights.
- (v) In the event that the bid does become fully unconditional Minorco must use its best endeavours to despatch the consideration due to accepting Consgold shareholders by 7 June.

Conclusion

This, as we have indicated, has been a most difficult case. We wish to emphasise, however, that legal proceedings taken by an offeree company without the consent of shareholders should not be employed so as to frustrate an offer. This applies whether the proceedings are brought in the Courts in this country or in any other jurisdiction. Such proceedings raise problems under the Code at the time when they create a clear conflict between their continuance and the offer timetable. If there is a risk of this happening, the offeree should consult the Panel well in advance. We expect that in practice the process of litigation will often require that shareholders' consent be sought after, rather than before, proceedings are commenced. Although the timing of any meeting should normally be for the offeree company to decide, shareholders may well find it easier to resolve the issue when the bid has reached a mature stage.

We do not anticipate that in the normal course of events, the decision of a majority could be rendered ineffective by the taking of proceedings by a third party. The present case is very exceptional. It has been Europe's largest takeover bid and has been bitterly contested between two major international groups. One protagonist is associated with the world's largest producer of gold. The other protagonist is the second largest producer. Over half the assets of Consgold are in the US. It is said by Newmont that the proposed bid could seriously affect the trading activities and interests of a major US public company which has its own interests separate from Consgold and which, on the evidence before us, has acted independently of Consgold. We consider that a situation of this kind, although it may arise again, will not frequently do so. Offeree companies should realise that this decision should in no way encourage them either to use foreign subsidiaries to commence frustrating proceedings, or to try to procure third parties to do so.

9 May 1989